

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

IN THE MATTER OF THE PROTESTS OF
DON AND SARA HETTER
PROTEST TO ASSESSMENT NOS. 664932, 664933
AND 664934;
STORM CONSTRUCTION
ID. NO. 02-179419-00 7, PROTEST TO
ASSESSMENT NO. 2037464; AND
PROTEST TO LIEN NOS 91761 AND 91764

NO. 99-12

DECISION AND ORDER

This matter comes on for decision following a formal hearing conducted on October 7, 1998 before Gerald B. Richardson. Don and Sara Hetter and Storm Construction, hereinafter, “Taxpayers”, were represented by Don Hetter. The Taxation and Revenue Department, hereinafter, “Department”, was represented by Monica M. Ontiveros, Special Assistant Attorney General. At the close of the formal hearing, the record was held open until December 7, 1998 to allow the Taxpayers to submit additional information for review by the Department and for the Department to make any adjustments it felt appropriate. Some of the matters in dispute have now been resolved between the parties, as will be more fully set forth below.

FINDINGS OF FACT

1. Taxpayers are New Mexico residents and were owners of a business, known as Storm Construction, a sole proprietorship.

2. Storm Construction was a construction contractor which specialized in building roads, streets or construction projects which required earth moving. The majority of the construction projects were performed for governmental entities. The Taxpayers also sold some mobile homes which were sold with the lots on which they were placed.

3. In 1995, the Department audited the Taxpayers.

4. As a result of the audit, on June 10, 1996, the Department issued Assessment No. 2037463, hereinafter, "the gross receipts tax assessment", to Storm Construction, assessing \$103,071.55 in gross receipts tax, \$1,950 in compensating tax, \$1,800 in withholding tax, \$10,682.26 in penalty and \$35,032.91 in interest for the reporting periods of January, 1992 through December, 1995.

5. On July 5, 1996, the Taxpayers filed a written request with the Department for a sixty day extension of time to protest the gross receipts tax assessment.

6. On July 19, 1996, the Department granted the Taxpayers an extension of time until September 8, 1996 to file a protest to the gross receipts tax assessment.

7. On September 6, 1996, the Taxpayers filed a written protest to the gross receipts tax assessment.

8. At the time of the Department's audit, the Taxpayers had not filed personal income tax returns with the Department for tax years 1992, 1993 and 1994. The Department's auditors estimated the Taxpayers' income tax liability treating the gross receipts of Storm Construction as income for the years involved and giving the Taxpayers the benefit of the standard deduction.

9. As a result of the Department's audit, on June 19, 1996 the Department issued to the Taxpayers Assessment Nos. 664932, 664933 and 664934, hereinafter, "the personal income tax assessments" for tax years 1992, 1993, and 1994, respectively.

10. On July 6, 1996, the Taxpayers filed a request for an additional sixty days to file a protest to the personal income tax assessments.

11. On July 19, 1996 the Department granted the Taxpayers an extension of time, until September 16, 1996, to file protests to the personal income tax assessments.

12. As a result of information the Taxpayers provided to the Department through the administrative protest procedure, the Department has abated the personal income tax assessments and those assessments are no longer in issue.

13. On December 24, 1996, the Department filed Notice of Claim of Lien No. 91761 against the Taxpayers to secure the payment of the gross receipts tax assessment.

14. On December 24, 1996, the Department filed Notice of Claim of Lien No. 91764 against the Taxpayers to secure the payment of the personal income tax assessments.

15. On January 3, 1997, the Taxpayers filed a protest to the filing of Lien Nos 91761 and 91764.

16. As a result of the abatement of the personal income tax assessments, the Department has released Lien No. 91764.

DISCUSSION

The Taxpayers were assessed gross receipts tax based upon the failure of Storm Construction to report receipts from performing construction services for governmental entities and upon its claim of deduction for receipts from performing construction services which it was not able to substantiate by providing the nontaxable transaction certificates required to support

its claim of deduction. During the audit years, Storm Construction derived a substantial amount of its gross receipts from performing road construction services for the National Park Service and the United States Forest Service. These entities represented to the Taxpayers that they were not subject to tax and informed the Taxpayers that it would be improper to charge them tax. In fact, these entities provided Mr. Hetter with a copy of letter from the Department's counsel to the General Counsel for the United States Department of Agriculture, which addresses whether nontaxable transaction certificates are needed to support claims of deduction when tangible personal property is sold to the United States or its instrumentalities. In pertinent part the letter states:

This will also confirm that a vendor *selling tangible personal property* to an agency or instrumentality of the United States is not required to obtain an NTTC in order to prove that the transaction is not subject to the New Mexico gross receipts tax. The vendor is required to obtain an invoice or other documentation to establish that the federal government is the entity making the purchase. In the event of audit, the vendor may use this documentation to prove the non-taxability of the transaction. (emphasis added).

The Taxpayer relied upon this letter in not charging its governmental clients gross receipts tax. Unfortunately, the Taxpayer was misled by the governmental entities it contracted with. While the statements above are true, because there is a deduction found at Section 7-9-54 NMSA 1978 for receipts from selling tangible personal property to the United States and other governmental entities, the deduction has no applicability to the Taxpayers' activities. This is because the Taxpayers were building roads, which activity is defined as "construction". Section 7-9-3 (C)(1). The Gross Receipts and Compensating Tax Act defines construction to be a service. Specifically, "service" is defined in pertinent part as follows:

“Service” includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project in New Mexico. (emphasis added).

Thus, the Taxpayers were not selling gravel and base course to their governmental clients when they contracted to build roads. Those construction materials became part of the construction service they was selling to their governmental clients. Because there is no deduction or exemption in the Gross Receipts and Compensating Tax Act for services sold to governmental entities, the Taxpayers were subject to gross receipts tax on all of their receipts from performing construction services for such entities.

The Taxpayers were able to produce a nontaxable transaction certificate for some subcontracting work done for Big J Enterprises. The Taxpayers’ receipts from Big J Enterprises had been included in the Department’s assessment because the Taxpayers had not produced a nontaxable transaction certificate to support a claim of deduction for those receipts when audited by the Department. Subsequently, the Taxpayers were able to demonstrate to the Department that they had a proper certificate in a timely manner from Big J Enterprises and the Department has agreed to adjust the gross receipts tax assessment, together with applicable penalty and interest, accordingly.

During the audit period, the Taxpayers had also bought some land, subdivided it, put in utilities, put in foundations and permanently affixed manufactured homes to the land, which they then sold. The Taxpayers’ total receipts from the sale of the homes and the land to which they were attached were included in the gross receipts upon which tax was assessed. Because there is a deduction provided at Section 7-9-53 NMSA 1978 for receipts from the sale of real property, the hearing record was left open for the Taxpayers to provide records to substantiate the value of the land so that it could be segregated from taxable gross receipts and the assessment adjusted

accordingly. Although Mr. Hetter said he could provide the records within thirty days of the hearing, the Hearing Officer granted Mr. Hetter sixty days to ensure that adequate time to locate and provide the records was given. No records were provided the Department. Because of this, the Taxpayers have lost their opportunity to present additional evidence on this issue. There being no evidence to substantiate further adjustments to the gross receipts tax assessment, the assessment, as adjusted by the Department, is upheld.

The last issue the Taxpayers raised with respect to the gross receipts tax assessment is that Mr. Hetter asked that his former wife, Sara Hetter, be absolved from any personal liability resulting from the gross receipts tax assessment. Mr. and Mrs. Hetter separated in September, 1991. A petition for a divorce, however, was not filed until December 3, 1996. In an Order filed in the divorce proceeding on September 9, 1997, Judge Kass ordered that all debts incurred by either party after September, 1991 be the sole and separate debt of the party incurring the debt. Mr. Hetter's request that Mrs. Hetter be absolved from any liability for the gross receipts tax assessment is based upon the language of the Order.

I find the Order to be less than clear with respect to how it would apply to the tax liability at issue. In addition to the language about debts incurred after the parties separated, the Order recites that the parties have acquired community property and obligated themselves to community debt and it further declares that assets acquired by either party after September, 1991, are the sole and separate property of the party acquiring the assets. It is not clear whether the Order's separate reference to the parties' community property and debts means to treat them separately from other debts and assets arising or acquired after September, 1991. Storm Construction Company was community property and the debts attributable to it would be community debts. In any event, it is not necessary to determine what the Court meant by the

Order. This is because the Department is not bound to follow the Order. The Department was not a party to the divorce proceedings between Mr. and Mrs. Hetter. The Order can only apply to establish the rights and liabilities of the parties to the proceeding in which it was entered.

The Taxpayers also protested the Department's liens which it filed to secure the taxes it assessed. Because the personal income tax assessment has been abated, the lien securing it, Notice of lien number 91764, has also been released. Lien number 91761 remains in place to secure the gross receipts tax assessment, as adjusted by the Department. The Taxpayers have presented no arguments as to why the lien is improper or invalid.¹ Having failed to carry their burden of proving the Department's lien to be defective or invalid in any manner, the Department's lien is upheld.

CONCLUSIONS OF LAW

1. The Taxpayers filed timely, written protests pursuant to Section 7-1-24 NMSA 1978, to the gross receipts tax assessment, the personal income tax assessments and Lien Nos. 91761 and 91764, and jurisdiction lies over both the parties and the subject matter of these protests.
2. The personal income tax assessments have been abated and the lien securing them, Lien No. 91764, has been released rendering the protests to those matters moot.
3. The Taxpayers have failed to carry their burden of proving the Department's gross receipts tax assessment to be invalid or incorrect.
4. The Taxpayers have failed to carry their burden of proving the Department's Lien No. 91761 to be invalid or incorrect.

For the foregoing reasons, the Taxpayers' protests ARE HEREBY DENIED.

DONE, this 9th day of February, 1999.

¹ Of course, the adjustments made in the gross receipts tax assessment as a result of the information the Taxpayer provided the Department have the effect of reducing the amount of liability the Department's lien secures.